BRIEF

In Support of Petition for Writ of Certiorari.

I.

OPINION.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was handed down July 30, 1943. It is reported Vol. 137 F. (2nd) 121. The motion for rehearing was filed **August 12, 1943**, and was overruled August 30, 1943.

II.

JURISDICTION.

(1) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, amended February 13, 1925, Chap. 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

(2) The date of the judgment to be reviewed is July 30, 1943 (R. 308). The motion for rehearing was overruled August 30, 1943 (R. 331).

(3) The facts showing jurisdiction have heretofore been set out in the petition under the heading, "Statement of Matter Involved," and under the "Questions Presented."

(4) The following cases sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the questions involved for the reasons set out in the specifications of error:

Erie v. Tompkins, 204 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188;

West v. Amer. Tel. & Tel. Co., 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 185;

Six Cos. of Cal. et al. v. District et al., 311 U. S. 180, 61 Sup. Ct. 186, 85 L. Ed. 159;
Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 Sup. Ct. 176, 85 L. Ed. 109;
Stoner v. N. Y. Life Ins. Co., 311 U. S. 464, 61 Sup. Ct. 336, 85 L. Ed. 284;
West Ohio Gas Co. v. Pub. Utilities Com., 294 U. S. 63, 55 S. Ct. 316;
San Juan Light Co. v. Requena, 224 U. S. 89, l. c. 96-97;
Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403;
Home Life Ins. Co. v. Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. Ed. 667.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition for certiorari under point I, under the heading, "Statement of Matter Involved," which in the interest of brevity is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

(1) In ignoring and "by passing" the state rule of law covering "waiver" where an insurance company examines an applicant and is put on notice with respect to his condition.

(2) In holding that the Missouri misrepresentation statute, Section 5843, R. S. 1939, did not apply to health and accident policies, contrary to the general acceptance of the Missouri bench and bar.

(3) In holding that under the Missouri law there was a warranty.

(4) In failing and refusing to follow the Missouri substantive rule of law that an insurance company waives all defenses not pleaded and relied on.

(5) In deciding the case on a theory on which it was not tried below.

(6) In failing and refusing to reverse the judgment with instruction to enter a judgment for the plaintiff below.

V.

SUMMARY OF THE ARGUMENT.

Waiver Where Company Placed on Notice.

(1) In Missouri, where an insurance company receives sufficient information of an applicant's condition to put it on notice, if it fails to ask for any further examination, it waives the same and is estopped to deny the insurability of the insured.

Misrepresentation Statute Applicable.

(2) The Missouri misrepresentation statute, Sec. 5843, R. S. Mo. 1939, applies to health and accident policies. Missouri and Kansas both have the identically same misrepresentation statute; both states have held that it applies to health and accident policies.

No Warranty Under Missouri Law.

(3) There was no warranty under the Missouri law. The trial court (R. 286) found that the contract "belongs to a species which fortunately is rapidly becoming extinct." Calling a statement a warranty does not make it so. Under the Missouri law there must be an intent to deceive. The Court of Appeals based its opinion upon statements made without intent to deceive (R. 308).

Refusal to Pay on One Ground Waives Others.

(4) Where an insurance company refuses payment on certain grounds under the Missouri law, **it waives all other grounds.** It matters not whether its position is taken by letter or by pleadings or by instructions to a jury. Having relied upon the issues of fraud and fraudulent misrepresentations and having failed to prove the same, its defense failed as a matter of law.

No New Theory on Appeal.

(5) The rule is well settled that a case must be decided on appeal on the same theory on which it was tried. The parties and the court below all tried the case in accordance with the universally accepted rule that the misrepresentation statute applies to health and accident policies in Missouri. The Court of Appeals had no right to decide it on some other theory inconsistent with the theory on **which the case was tried and contrary to Missouri law and Missouri policy.**

Petitioner Entitled to Directed Verdict.

(6) Since the defense invoked was fraud and fraudulent misrepresentation with intent to deceive and since it failed, the trial judge should have directed a verdict for the plaintiff below, and the petitioner having urged the point on appeal, the Court of Appeals should have remanded the case with directions to enter a judgment for petitioner (plaintiff below).

ARGUMENT.

1.

Waiver Where Company Placed On Notice.

In Missouri the law is well settled that where an insurance company receives information regarding an applicant's condition, which is sufficient to put it on notice, it waives any further examination, if it does not request any further examination, and is estopped to deny the insurability of the applicant. As to what constitutes such notice, it was held in **Brummer v. Insurance Co.**, 59 S. W. (2d) 781, l. c. 786, that where an applicant had an abscess which necessitated the removal of a part of a rib and the insertion of a drainage tube and was in the hospital for a period of time, although she had denied that she had any lung trouble, this was sufficient to put the insurance company on notice, or at least to put the examiner on inquiry as to the condition of her lungs.

In the case of **Loduca v. Ins. Co.**, 105 S. W. (2d) 1011, the St. Louis Court of Appeals specifically points out that it is not necessary for the insurance company to actually know the condition; it is sufficient if it is put on notice. The test laid down by the Court is that it will, as a general rule, suffice that the insurer had information which, if pursued with reasonable diligence, would have led to the discovery of the breach (citing a number of Missouri cases [l. c. 1013], and also citing Supreme Lodge v. Kalinski, 163 U. S. 289, l. c. 298, 16 S. Ct. 1047, 41 L. Ed. 163).

To the same effect is the rule of law laid down in **State ex rel. v. Allen**, 303 Mo. 608, 262 S. W. 43.

2.

Misrepresentation Statute Applicable.

This Court has recently held in several cases, beginning with the Erie Case, supra, that the federal courts are bound to follow the state law construing state statutes

(cases cited under Point 2, Reasons for Granting the Writ). The Court of Appeals, in its opinion (R. 320), quotes from the case of **Lamport v. General Accident etc. Corp.**, p. 100 of 197 S. W., with respect to an accident policy, which we have set out in the petition for certiorari, and, in the interest of brevity, do not repeat here. The Lamport case, which was decided by the Supreme Court of Missouri, shows on its face that that Court holds "that such a policy" would likewise be a policy of insurance on life within the scope of the Misrepresentation Statute. The fact that the Supreme Court adds, "or at least so much thereof as relates to indemnity for loss of life," does not alter the fact that the Court also holds that a health and accident policy is within the purview of the statute.

The attention of the Court of Appeals on motion for rehearing was called to the Missouri decisions (R. 325), and was also called to the law, as pronounced by this Court, that where there is a pronouncement of the state law by a state appellate court, which ruling apparently has not been disproved and there is no evidence that the law of the state is otherwise, it is the duty of the federal courts to follow the state rule. **West v. Tel. & Tel. Co.**, 311 U. S. 223. **Six Companies of California et al. v. Joint Highway District et al.**, 311 U. S. (2d) 180, and other cases cited under point 2, Reasons for Granting the Writ. This is particularly true where the same has been so construed by the Bench and Bar. What better evidence can there be than the decisions we have cited and the fact that the trial court and counsel for both parties assumed that the Misrepresentation Statute applied at all time, not only in the trial court, but even in the Court of Appeals and in this Court when the company applied for a writ of certiorari, as set out supra. Note the language of the statute, "unless the matter misrepresented shall have actually contributed to the **contingency or event.**" The statute does not mention **death.** The chapter under consideration,

Chapter 37, Article II, R. S. Mo. 1939, which was also in force at the time of the application in question, deals with "Life and Accident Companies."

Furthermore, statutes of this kind are liberally construed. The Legislature had in mind personal insurance as opposed to property insurance. In a sense the insurance in question was insurance on Ettman's life. It was to pay him disability benefits during **his life** and, therefore, was insurance on his life within the meaning of the statute as held by the Supreme Court of Missouri in the Lamport case, supra, and the Makos and Boillot cases, supra.

The Supreme Court of Kansas in passing upon the Kansas statute, G. L. 1935, 40-418, which is word for word like the Missouri statute, held "The statute applies to health and accident policies." **Elliff v. Interstate Bus. Men's Assn. Co.**, 153 Kans. 177, 109 Pac. (2d) 92, l. c. 95.

While the Kansas Law is not controlling here, it indicates that the Kansas policy is similar to that of Missouri; both states have construed the statute to apply to health and accident policies.

3.

No Warranty Under the Missouri Law. Bad Faith Essential Element.

The trial court found that the contract in question "belongs to a species which fortunately is rapidly becoming extinct." Calling a statement a warranty does not make it so. Under the Missouri law there must be an intent to deceive. The Court of Appeals in its opinion found that there was no fraud since there was no knowledge on the part of the applicant (R. 308). In the case of Ins. Co. v. Glaser, 245 Mo. 377, 150 S. W. 549, cited by the Court of Appeals in the Court's opinion (R. 318), the Supreme Court of Missouri expressly holds that (l. c. 389, 245 Mo.) "as a basis for such relief on the ground

of fraud, the mere falsity of the statements and breach of warranties are not alone sufficient. It is essentiai that the applicant **had knowledge of their falsity** and acted **in bad faith,** to warrant that remedy," citing Schuerman v. Ins. Co., 165 Mo. 641; Kern v. Legion of Honor, 167 Mo. 471; Keller v. Ins. Co., 198 Mo. 440. The Court of Appeals has confused the **judgment** of the Missouri Supreme Court with its **pronouncement** of the Missouri law. In the Glaser case there was a rescission before the occurrence of the contingency, on the ground of **mistake not fraud.** Where the remedy is sought on the ground of fraud even in connection with warranties bad faith is essential. l. c. 389, Glaser case, supra.

The Schuerman case, supra, is the leading case in Missouri in holding that an insurance company is not entitled to equitable relief after the occurrence of the contingency calling for performance under the policy. The reason for the enactment of the misrepresentation statute is discussed by the Court (l. c. 653) and the evil of inserting **warranties** in policies and avoiding their obligations by insurance companies is discussed. Certainly everything discussed by the Court there is applicable to health and accident policies as well as straight life insurance policies.

In Kern v. Legion of Honor, 167 Mo. 471, 67 S. W. 252, the Missouri Supreme Court discusses the statute in question (l. c. 487) and the evil that had grown up of making statements and answers warranties in policies. The Court says that the real meaning of the statute is (l. c. 489) "to hold that no misrepresentation, whether innocent or fraudulent, when based upon a warranty of truth by the terms of the policy or not, shall be a defense 'unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.' "

The statute is also held to apply alike to warranties and misrepresentations in Jacobs v. Life Assn., 146 Mo. 523, 48

S. W. 472, and Jenkins v. Ins. Co., 171 Mo. 375, 71 S. W. 688.

Therefore, it follows that under the Missouri law, it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application, that they were false in some particular material to the insurance risk, that the applicant had knowledge of their falsity and acted in bad faith and that the company relied and acted upon such statements and but for such misrepresentations would not have assumed the risk. There was an utter failure to prove these vital elements by the insurance company in the instant case.

The opinion of the Court of Appeals **is in conflict** with the case of **Ward v. Standard Accident Ins. Co.**, 30 F. (2) 328 (C. C. A. 3), where the provision in the application was:

> "I hereby apply for a policy to be based upon the following statement of facts. I understand and agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with the intent to deceive or materially affects with the acceptance of the risk or the hazard assumed by the company."

Note that the phraseology is identical with that in the case at bar except that one of the phrases is transposed. The alleged misrepresentations are the answers to two questions. The first question and answer is: "Is your sight or hearing impaired? No, ordinary use of glasses." The applicant was peculiarly susceptible to detachment of the retina upon the slightest injury or strain. She had admitted this to her doctor. She had had trouble with her eyes when a child. The Court stated that the answer of the applicant showed that her sight was not normal; that her vision was impaired, but the Court re-

fused to say that her answer was false or that it was made with intent to deceive or that it materially affected the acceptance of the risk or the hazard assumed (l. c. 329). The second question and answer is: "State what medical or surgical attention you have received within the past five years. None." She had consulted Dr. Dennis, an eye specialist, to have her glasses looked over and had her lenses checked up every two or three years. The Court held that this statement made by her could not be said to be false. A judgment for the plaintiff was affirmed for a fall in the bath tub, injuring her spine and bringing about a detachment of the retina of her eye and the total loss of sight.

In the case of **Kettenbach v. Omaha Life Assn.**, 69 N. W. 135, the application contained even stronger language with reference to warranty. That Court said that the fact that sometimes the word "warranties" was used and sometimes the word "statements," indicated that it was not the intent of the parties that the validity of the policy should depend upon the literal truth of every answer and statement made in the application.

In the case at bar the word "statement" is used in connection with the falsity of any statement (R. 23).

The Nebraska Court pointed out that it might require a post mortem examination to enable medical experts to determine whether any of the organs of applicant had been diseased since childhood. The last two cases are cited to show that the opinion is contrary to the better reasoned cases from other jurisdictions and therefore against the weight of authority. We could cite many other cases. Many of them were cited in the Court of Appeals brief.

4.

Refusal to Pay on One Ground Waives Others.

Where an insurance company refuses payment on certain grounds, under the Missouri law it waives all other grounds.

Lee v. Met. Life Ins. Co., 235 Mo. App. 900, 144 S. W. (2d) 830, 235 Mo. App. 900;
Corcoran v. Met. Life Ins. Co., 93 S. W. (2d) 1027;
Lamphermier v. N. W. Mut. Life Ins. Co., 24 S. W. (2d) 1062;
Ash Grove Service etc. v. Southern Surety Co., 39 S. W. (2d) 434, 441 (waiver in letter);
Goffe v. Surety Co., 321 Mo. 140, 95 S. W. (2d) 929, 938.

In the case at bar, the only defense invoked by the company was one based on fraud and fraudulent misrepresentations made with intent to deceive. Therefore, it waived any other defense, if any it had. This was the only defense pleaded, the only defense invoked in the trial of the case, as shown by the defendant's requested instructions, which were refused by the Court (R. 266, 271). This was the only defense urged in the Court of Appeals; likewise, it was the only ground upon which the insurance company sought to cancel the policy in the trial court, in the Court of Appeals and in this Court on certiorari, as we have shown above. Under the Missouri law, it was wholly insufficient to simply plead the terms of the policy in haec verba as a warranty.

The St. Louis Court of Appeals in the Brummer case, supra, held that because the company had pleaded that it refused to pay the policy "on account of the aforesaid misrepresentations and false and fraudulent warranties," this was insufficient and that it was insufficient to merely quote the provisions of the policy, and they held there was no mere defect in pleading which could be

cured by verdict. In other words, it is a matter of substantive law; it is a waiver under the state law of any other defense than that pleaded, and therefore the Federal Court has no right to construe the pleadings in a way that deprives the plaintiff of a substantive right. Otherwise a litigant would have one brand of law in the state court and another in the Federal Court. If he has certain rights under the state law, he must have those same rights in a Federal Court. It is not merely a rule of pleading, it is a rule of substantive law. The Federal Rules of Procedure also hold that all defenses not pleaded are waived [Rule 12 (h)].

The Court will readily see the importance of this question since it is bound to arise again and again and create a conflict unless it is decided by this Court. It matters not, therefore, whether the legal position of the company is taken by letter, by the pleadings, by the instructions, or by the position in the appellate court. Having taken a position and denied liability on certain grounds, it waives all other grounds under the state law.

The Court of Appeals, therefore, had no authority to disregard the state substantive law and to hold that warranties were within the answer filed by the company, and that it was immaterial that the company "assumed in the pleadings and upon the trial that it must prove an intent on the part of the insured to deceive" (R. 321).

5.

No New Theory on Appeal.

The rule is well settled that a case must be decided on appeal on the same theory on which it was tried. The parties on appeal both assumed that the Misrepresentation Statute applied. The trial court tried the case on that theory, the Court of Appeals decided it on the theory that the Misrepresentation Statute did **not** apply. None of

the cases cited by the Court of Appeals support it. It is true they were cases where there was a death benefit but other than in the Williams case cited by the Court of Appeals (R. 319) the disability benefits grew out of accidents and the assureds were suing to collect disability benefits. We do not believe there is any case in Missouri where the policy is a purely health and accident policy, where the Court has held that the Misrepresentation Statute does not apply. We found none, the Court of Appeals found none. Everything points to the application of the Misrepresentation Statute.

We submit that under the decisions of this Court that the Court of Appeals has no right to disregard the policy of the State of Missouri where that policy has been enunciated by the courts of this state and has been accepted by the Bar, including the trial judge and including the lawyers for both sides, in the instant case. Therefore, as we stated above, in our application for certiorari, the decision of the Court of Appeals contravenes the recent decisions of this Court holding that the federal courts are bound to follow the state rule on matters of substantive law. It was not a plain error of law not raised or argued, as the Court of Appeals states in its opinion (R. 319). On the contrary, it was an error of law committed by the Court of Appeals in refusing to follow the law of the state as announced by the courts, and as accepted by the Bench and Bar of Missouri.

6.

Petitioner Entitled to Directed Verdict.

Since the defense invoked was fraud and fraudulent misrepresentation with intent to deceive, and since it failed, and since it was the only defense pleaded and relied on in any of the courts by the Company, there should have been a directed verdict for the plaintiff in the trial court. This

was requested and refused (R. 262). The trial court found that Dr. Salter had mistakenly written "No" under question 4 in the application. Besides if "No" was true as to any one of several questions included in one, it was not false as to any. Van Wormer v. Ins. Co., 188 Ill. App. 166.

The trial court refused the instructions offered both by plaintiff and defendant, which covered fraud and fraudulent misrepresentation with intent to deceive. This was the only issue submitted by either party. It simply instructed the jury to find for the defendant if the plaintiff had the condition retinitis pigmentosa at the time of the application, explaining to the jury (R. 250), "under the law no fraud or dishonesty is involved one way or another." The Court of Appeals should have reversed with directions.

CONCLUSION.

In conclusion, it is obvious that an injustice has been done to petitioner, which would not have been done had his case been tried in the state court. If the result in question stands, the purpose of this Court in the Erie decision will have been thwarted. There can be no uniformity if the federal courts do not follow the state law as announced by the courts and as accepted by the bench and bar of that state.

For the reasons set out above, we earnestly urge this Honorable Court to grant the application for certiorari in order that the matter may be fully presented before this Court for its determination.

Respectfully submitted,

J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Counsel for Petitioner.